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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1099

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

against

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

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HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

Statement

Henry Diamond, New York State Commissioner of Environmental Conservation[1] (hereinafter referred to as "respondent"), submits this brief in opposition to the application of petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus (hereinafter referred to as "petitioners"), to review the order of the Court of Appeals of the State of New York denying petitioners leave to appeal

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[1] At the time that this proceeding was commenced Henry Diamond was Commissioner of Environmental Conservation of the State of New York. Ogden R. Reid is now the Commissioner of Environmental Conservation of the State of New York.

from an order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, which affirmed the order of the Supreme Court of the State of New York (Special Term, Onondaga County) dismissing their petition seeking an order to prohibit respondent's holding of a statutory water pollution abatement hearing.[2] Thereafter, petitioners applied to the Court of Appeals of the State of New York for leave to appeal from the order of the Appellate Division and such application was denied.

Question Presented

Is there a substantial Federal constitutional question raised, warranting the granting of petitioners' application for a writ of certiorari to review the dismissal by the Courts of New York of petitioners' application for an order to prohibit respondent's holding of a statutory hearing to consider modification of a water pollution abatement order, when the contention sought to be raised in this Court by petitioners—that respondent has contracted away his statutory authority to modify the water pollution abatement order involved—has not been passed upon by the Courts of New York, which have held that this objection is premature since it may be raised in the administrative proceeding and thereafter judicially reviewed?

Facts

Petitioners are the owners and operators of a municipal sewage collection system and treatment plant. On June 29, 1966, respondent's predecessor, Hollis S. Ingraham, M.D., Commissioner of Health of the State of New York, issued a

[2] In effect, petitioners seek *certiorari* to review the order of affirmance made by the Appellate Division.

water pollution abatement order which directed petitioners to cease and abate all discharges of sewage or industrial wastes or other wastes or effluents into the waters of the State of New York in contravention of stream standards adopted and assigned to the receiving waters by July 11, 1966, unless petitioners embarked upon a timetable of construction therein specified.

On October 4, 1972, respondent Diamond issued an order consented to by petitioners (Petitioners' brief, Appendix A-4, pp. 15-19) which modified the original 1966 order by substituting, for the construction timetable contained in the original order, a timetable for making certain enumerated repairs and implementing an infiltration elimination program.

On July 6, 1973, in a proceeding instituted by one William J. Charles against petitioners and respondent herein, seeking judicial review of respondent Diamond's denial of Charles' application for a permit to extend to his property the sewer lines of the Village of Camillus (*Mtr. of Charles* v. *Diamond, et al.*, 42 A D 2d 232 [4th Dept., 1973]) (Appendix "B" attached hereto), the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, rendered a decision holding that petitioners herein had not complied with respondent's aforesaid order. The Appellate Division directed respondent herein to act to require petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus, to comply with the aforementioned order and to "rectify an unhealthy, polluting condition which admittedly exists." (Appendix, p. A9).

On July 26, 1973, respondent issued a Notice of Hearing to petitioners (Appendix "C") "* * * for the purpose of receiving any evidence relevant to such modifications of said orders as should properly be made." The Notice of Hearing recited, among other things, that it appeared necessary to

establish a definite date on or before which all polluting discharges of sewage or wastes or effluents thereof by petitioners into the waters of the State shall be abated (Appendix, p. A13).

Petitioners then sought an order in the nature of prohibition, to prevent the holding of the hearing, serving a notice of petition and petition, returnable at Special Term, Supreme Court of the State of New York, Onondaga County, on November 26, 1973. Prior to the return date of petitioners' aforesaid application, respondent moved to dismiss petitioners' application and this motion was granted.

Petitioners appealed from the order and judgment dismissing the petition, which order and judgment was affirmed on appeal by the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. Petitioners then sought, and were denied, leave by the Court of Appeals of the State of New York to appeal from the Appellate Division order to that Court.

They then petitioned this Court for a "Writ of Certiorari to the Court of Appeals for the State of New York".

Relevant Statutes, Rules and Regulations

In accordance with Rule 40, the relevant statutes, rules and regulations have been set forth in Appendix "A" of this brief.

ARGUMENT

No substantial Federal constitutional question is presented since (a) petitioners' application to this Court is premature, the Courts of New York not having reached, nor having been required to reach, the alleged constitutional question sought to be raised by petitioners; and (b) the 1972 order on consent entered into by petitioners and respondent is not a contract

within the meaning of Article I, Section 10, Clause 1, of the Federal Constitution.

POINT I

Petitioners' application to this Court is premature, the Courts of New York not having reached, nor having been required to reach, the alleged constitutional question sought to be raised by petitioners.

The well established law of the State of New York holds that an applicant for an order prohibiting an administrative proceeding must establish (a) that the administrative agency is proceeding in excess of its jurisdiction, (b) that judicial review is not available to correct possible administrative error, and (c) that irreparable injury would be sustained if the proceeding were not prohibited. *Matter of Greater N. Y. Corp. of Seventh Day Adventists* v. *Commission on Human Rights of City of N. Y.*, 27 N Y 2d 898 (1970); mot. for reargument den. 28 N Y 2d 718 (1971).

In the instant case, the New York Court of first impression, the Supreme Court, Special Term, held that even assuming that the allegations of the petition were true (for the purposes of the motion), the petition was legally insufficient in that it did not show extreme necessity for the order or irreparable injury if the proceeding was not prohibited.

In dismissing the petition, Special Term specifically stated that the question of whether respondent

> "is bound by its 'duly executed contract' and thereby precluded from making any modification." (Petition, p. 13.)

is not lost to petitioner as

> "Such contentions and the evidence relating thereto may be offered at the hearing, made part of the record, *and*

judicially reviewed" (Emphasis ours). (Petiton, pp. 13, 14.)

Thus, the Courts of New York held that, in the event the hearing resulted in issuance of a modified order, the judicial review provided by Environmental Conservation Law, § 17-0909(2), would include review of the order of modification as well as any objection that petitioner chose to raise as to respondent's capacity to hold the hearing. Thus, in the event of an order which petitioners might deem adverse to their interests, petitioners' right to complete legal redress is preserved.

Petitioners having failed to establish that they have no other legal redress or that they would be subject to irreparable harm if the hearing is not prohibited, have not, as a matter of New York State law, established any legal basis for the writ of prohibition sought in their petition. *Matter of Greater N. Y. Corp. of Seventh Day Adventists* v. *Commission on Human Rights of City of N. Y.*, 27 N Y 2d 898 (1970); mot. for reargument den. N Y 2d 718 (1971), *supra; cf. Ex Parte Fahey*, 332 U. S. 258.

POINT II

The 1972 order entered into on consent by petitioners and respondent is not a contract within the meaning of Article I, Section 10, Clause 1, of the Federal Constitution.

In October, 1972, respondent determined that petitioners were unable to comply with the water pollution abatement order issued in 1966 and that the water pollution from petitioners' sewage plant had not been minimized. Respondent, being faced with the statutory mandate to abate water pollution had but two alternatives. The first alternative was to schedule and hold a public hearing and issue an order fix-

ing a pollution abatement schedule, while the second alternative was to reach amicable agreement on the terms of, and issue an order on consent to achieve the same purpose. The authority for respondent to issue either type of order stems from the same statutory source (ECL 17-0303[4][b])[3] and there is no difference between either order, as an order on consent has the same effect as one issued after a public hearing. 6 NYCRR Part 658(c)[4].

Petitioners, in their petition for certiorari, concede that respondent has authority to modify a water pollution abatement order (Pet., p. 6), but contend, without citation of statute or case authority, that by issuing an order on *consent*, respondent "contracted away" his statutory authority to modify this order.

Since respondent would not have the capacity to enter into an agreement in which he divests himself of his statutory authority, it follows that the consent order herein cannot be construed as a contract by which he divested himself of his statutory authority to modify the instant water pollution abatement order. *Matter of Rochester Tr. Corp.* v. *Public Serv. Comm.*, 271 App. Div. 406 (3rd Dept., 1946) mot. for lv. to app. den. 296 N. Y. 1061 (1947), *supra; Matter of Campo Corp.* v. *Feinberg*, 279 App. Div. 302 (3rd Dept., 1952), affd. without op. 303 N. Y. 995 (1952).

In rejecting petitioners' contention, the Courts of New York State have followed the State's well established law that an administrative official has no capacity to divest himself of authority devolved upon him by the Legislature. *Matter of Rochester Tr. Corp.* v. *Public Serv. Comm., supra; Matter of Campo Corp.* v. *Feinberg, supra.*

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[3] Citation references to "ECL" are to the New York State Environmental Conservation Law.

[4] Citation references to "NYCRR" are to the Official Compilation of Codes, Rules and Regulations of the State of New York.

This was in accord with "Hornbook" law that an essential element of any contract is that the parties have capacity to enter into same. The respondent, being a State official with only the authority prescribed by statute (New York's Water Pollution Control Law [ECL, Art. 17]), the capacity of the respondent to enter into any "contract" must of necessity be derived solely from his statutory authority to issue water pollution abatement orders.

CONCLUSION

The application for Certiorari should be denied.

Dated: March 31, 1975.

Respectfully submitted,

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APPENDIX A

RELEVANT STATUTES

New York State Environmental Conservation Law[5]

The legislative policy with respect to pollution control is found in Environmental Conservation Law, § 1-0101, entitled "Declaration of policy", which provides, in pertinent part, as follows:

> "1. The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land and air pollution, ***"

The specific article of the Environmental Conservation Law directed to the abatement of water pollution is Article 17, the Water Pollution Control Law, the relevant sections of which are as follows:

> "§ 17-0101. Declaration of policy
>
> "It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wildlife, including birds, mammals and other terrestrial and acquatic[1] life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.
>
> "1. So in original. Probably should read 'aquatic.' "
>
> "§ 17-0103. Statement of purpose—provides as follows:
>
> "It is the purpose of this article to safeguard the waters of the state from pollution by preventing any new

[5] All references to statutes, unless otherwise specifically noted are to statutes enacted by the Legislature of the State of New York.

pollution and abating pollution existing when the predecessor of this chapter was enacted, under a program consistent with the declaration of policy stated in section 17-0101."

The statutory authority of the Commissioner of Environmental Conservation to hold water pollution abatement hearings, to adopt rules and regulations governing such hearings, or to make, modify or cancel administrative orders, is found in § 17-0303, which reads, in pertinent part, as follows:

"§ 17-0303. General powers and duties applicable to portions of this article

* * *

"2. The department shall have administrative jurisdiction to abate and prevent the pollution of waters of the state in the manner herein provided in accordance with the classification of waters adopted by the department pursuant to section 17-0301.

"3. The department, acting through the commissioner may, from time to time, adopt, amend, or cancel administrative rules and regulations governing the procedure to be followed with respect to hearing, filing of reports, the issuance of permits, and all other matters relating to procedure, and generally, may make such administrative rules and regulations, and do and perform any and all acts, not inconsistent with the provisions of this article * * *. Such rules and regulations, before becoming effective, shall be filed with the secretary of state for publication in the 'Official Compilation of Codes, Rules and Regulations of the State of New York' published pursuant to section 120 of the Executive Law.

"4. The Commissioner is hereby authorized to:

"a. Hold any public hearings, receive pertinent and relevant proof from any party in interest who appears at such hearing, compel the attendance of wit-

nesses, make findings of fact and determinations, and assess such penalties therefor as are hereinafter prescribed, all with respect to the violations of the provisions of this article listed in subdivision 1 of this section, or the orders issued by the commissioner;

"b. Make, modify or cancel orders requiring the discontinuance of the discharge of sewage industrial waste or other wastes into any waters of the state in accordance with the provisions of this article listed in subdivision 1 of this section, and specifying the conditions and time within which such discontinuance must be accomplished."

The Commissioner's authority to investigate and inquire into any alleged water pollution is set forth in Environmental Conservation Law, §17-0905, which provides (in pertinent part):

"§17-0905. Proceedings before the commissioner

"1. The commissioner may, on his own motion, investigate or make inquiry, in a manner to be determined by him, as to the condition of any of the waters of the state and as to any alleged act of pollution or omission or failure to comply with any provisions of titles 1 to 11, inclusive, or title 19 of this article.

"2. Whenever it shall appear to the commissioner, after investigation, that there has been a violation of any of the provisions of titles 1 to 11, inclusive, or title 19 of this article, he shall give written notice to the alleged violator or violators setting forth any thing or act done or omitted to be done or claimed to be in violation of any such provisions, and requiring that the matters complained of be correct, or that the alleged violator appear in person or by attorney before the commissioner or his duly designated representative, at the time and place in said notice specified, and answer the charges complained of."

Appendix A

All determinations of the Commissioner of Environmental Conservation are subject to review by the courts. Section 17-0909(2) of the Environmental Conservation Law provides:

> "2. All orders or determinations of the commissioner or the department shall be subject to review as provided in article 78 of the Civil Practice Law and Rules. * * *"

RELEVANT RULES AND REGULATIONS

The rules and regulations relevant to this application, adopted by the Commissioner of Environmental Conservation, are published in Volume 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, as Part 658 (6 NYCRR Part 658). Rule 658.13 relates to consent orders and the relevant portions thereof are as follows:

> "658.13 Stipulations and consent orders. (a) At any time prior to the issuance and service of the notice of hearing in any proceeding, the commissioner, in his discretion, may enter into a stipulation with a prospective respondent whereby the latter admits the material facts and agrees to discontinue the acts or practices which are violative of the act. Such stipulation shall be admissible as evidence of such acts and practices in any subsequent proceedings against such person before the commissioner.
>
> * * *
>
> (c) Upon a record composed of the notice of hearing and the stipulation or agreement consenting to the order, the commissioner may enter the order consented to by a respondent, which shall have the same force and effect as an order after hearing."

APPENDIX B

Hence, in this case I would direct that an *in camera* hearing be held in connection with the new trial, in order to determine whether disclosure should be required. The Trial Justice after obtaining the facts, is in a far better position to make the decision than we are on this record. I therefore concur in the reversal and the direction of a new trial, but dissent from the direction for disclosure without an *in camera* hearing, conducted under the conditions stated herein.

MUNDER, GULOTTA AND CHRIST, JJ., concur with SHAPIRO, J., HOPKINS, Acting P.J., concurs in the refersal and the direction of a new trial, but dissents from the direction for disclosure without an *in camera* hearing, with an opinion.

Judgment of the Supreme Court, Kings County, rendered June 11, 1971, reversed, on the law, and new trial ordered.

In the *Matter of William J. Charles,* Appellant, v. *Henry Diamond,* as Commissioner of Environmental Conservation, *et al.,* Respondents.

Fourth Department, July 6, 1973.

Health—water pollution control—order to complete new sewage treatment facility—petition states cause of action in alleging petitioner unable to develop apartment project on land requiring connection to village sewage system where village was enjoined by New York State Department of Environmental Conservation from making new sewer extensions until it completed new treatment facility—village has not complied and has not been forced to comply for seven years—cause of action also stated on constitutional grounds.

Appendix B

1. Petitioner, who wishes to build an apartment project on land which, by law, must be connected to village sewers, sought judicial review of the actions of respondent New York Department of Environmental Conservation which has enjoined any new extensions of the sewer system of respondent Village of Camillus. The department's order, issued seven years ago, required the village to plan and complete a sewage treatment facility to cure a pollution problem, but the village has not complied and no steps have been taken to enforce the order. Although respondents may not be told to perform their responsibilities, they may be told that they must act. The combination of the village's right under its police powers to require that there be a village sewer connection and the department's right to restrict the village, frustrates the petitioner's right to demand that his property be served by the village sewer system. The motion to dismiss the petition should be denied.

2. There is also a cause of action stated on constitutional grounds. Police powers may not be used to restrict the use of petitioner's property indefinitely without a corresponding benefit to the public. The petitioner is not contributing to the pollution, but is penalized for the lack of compliance by the village.

Matter of Charles v. *Diamond*, 71 Misc 2d 440, reversed.

Appeal from a judgment of the Supreme Court at Special Term (FRANCIS R. MORAN, J.), entered September 27, 1972 in Onondaga County, dismissing the petition.

MTR. OF CHARLES v. DIAMOND [42 A D 2d 232]

Oot, Greene, Setright, Hershdorfer & Sharpe (*Victor J. Ciabotti* of counsel), for appellant.

Appendix B

Louis J. Lefkowitz, Attorney-General (*Martin H. Schulman, Ruth Kessler Toch* and *Stanley Fishman* of counsel), for Henry Diamond, respondent.

Eli Gingold, County Attorney (*Hugh C. Gregg, II,* of counsel), for William Harris, respondent.

Alexander J. Hersha for Village of Camillus, respondent.

SIMONS, J. This is an appeal from a judgment which granted respondents' motion to dismiss this article 78 proceeding on the ground that the petition fails to state a cause of action. On review we assume the truth of all the statements contained in the pleading and consider them in the light most favorable to the pleader (*Matter of Hassett* v. *Barnes,* 11 A D 2d 1089).

Petitioner alleges that he owns land in the Village of Camillus, New York. He wishes to build an apartment project on it and the Village Board has approved the construction and authorized the Mayor to improve the connection of the project to the village sewer system. However, since 1966 the respondent, New York State Department of Environmental Conservation (and its predecessor) has enjoined new extensions of the village sewer system because the sewage treatment facilities are inadequate and the village is discharging pollutants from its sewer system into the waters of Nine Mile Creek. The order of 1966, predicated upon a stipulation of the material facts by the parties, required a treatment facility to be completed by 1969. Correspondence between the department and the village, set forth in the record, refers to the "long-standing pollution" problem and the village's obligation to "minimize" it by temporary measures while preparing a new facility to correct the situation. Petitioner claims that the village has done nothing and that at this time it has no concrete plans to comply with the order. The department has not enforced the construction provisions of the or-

der and states that that part of the order is "in abeyance." Nevertheless, until the village complies, the Department of Environmental Conservation refuses to approve petitioners' application to connect to the village sewer system.

The petitioner initiated this proceeding claiming that the actions of the respondents are illegal and arbitrary and result in the unconstitutional confiscation of his property. The Department of Environmental Conservation, and the County Health Department moved for dismissal claiming that they had no legal obligation to the petitioner that had been abused and that they acted within their statutory authority to regulate pollution of public waters and were properly performing that function by attempting to regulate the municipal sewage outlet which discharges pollutants into Nine Mile Creek by regulating the owner of the system (see 10 NYCRR Appendix 72-B 21). In the alternative, they contend that even if petitioner has standing to challenge these acts, their conduct consisted of legal, discretionary acts not subject to mandamus or review under article 78.

The village moves for dismissal on the grounds that it has not performed any illegal or arbitrary acts. It asserts that it granted petitioner the requested permission to connect with the sewer system and only the State's sanction prevented his use of his property. In any event, it asserts its conduct consisted of legal, discretionary acts not subject to mandamus or review by the courts.

The petition states grounds for relief and the order should be reversed and the motions to dismiss denied.

The petitioner owns land which by law must be connected to village sewers before it may be developed. That restriction is a proper exercise of the village's police powers (*Hutchinson* v. *City of Valdosta,* 227 U.S. 303). However, the converse of

that requirement is that a taxpayer, upon payment of appropriate charges, may demand that his property be served by the sewer system (cf. *Barr* v. *Algon Realty Corp.*, 166 Misc. 177, 183, affd. 255 App. Div. 869, mot. for lv. to app. den. 280 N.Y. 849; and see *People ex rel. Hilliker* v. *Pierce*, 64 Misc. 627; *Matter of Dexter Sulphate Pulp & Paper Co.* v. *Shaver*, 183 Misc. 275 [water supply]; *People ex rel. Bloy* v. *Walker*, 113 Misc. 592 [sidewalks]). Because of the department's order and the failure of the village to comply with that order, petitioner has been denied the right to connect to the sewer system and lawfully to develop his property. Furthermore, even though it is apparent that the village has not complied with the order of 1966, the department has not taken steps to enforce correction of the treatment facilities and contemplates none°.

It may be that the department's use of persuasion and restrictions on expansion is the most advisable course of action to induce compliance by the village under all the circumstances. Certainly we do not suggest that the restraint imposed was improper or that limitations should be placed on the department's statutory powers to control pollution (see ECL, § 17-0303). Be that as it may, when related solely to this case and without the benefit of answering pleadings or proof, the posture respondents have assumed leaves petitioner hopelessly frustrated in any fruitful effort to develop his property.

In short, the village is mandated by a lawfully correct regulatory order to act to rectify an unhealthy, polluting condition which admittedly exists. It has not only failed to comply with the regulatory order but because of that failure it is

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° It does not appear whether all development in the village has ceased for seven years because of the order, which seems unlikely, or whether the State's prescription on connections has discriminated against only certain property owners.

not able to perform its legal obligation to permit petitioner to connect the proposed developments on his property with the municipal sewer system. Over seven years have passed since that order was issued and it is claimed not that progress towards correction is incomplete but that there has been no progress at all. While the court may not tell these coequal branches of government how to perform their responsibilities in the matter, we may tell them that they must act. The village's problem has been defined and the general requirements for solution are apparent. It is not a matter of choice whether the village will or will not comply with the order of the department. Its officials recognize the validity of the order. If indeed the respondents have no justification for failing to perform the legal duties imposed upon them, then the court should supply the necessary kinetic energy to resolve the problem and order performance. (See *People ex rel. Harris* v. *Commissioners of Land Office,* 149 N.Y. 26.) The petition states a cause of action under article 78.

It also states a cause of action on constitutional grounds. It is axiomatic that the use of private property may be regulated in the public interest and even a total restriction on the use of the property has been tolerated temporarily (see *Matter of Golden* v. *Planning Bd. of Ramapo,* 30 N Y 2d 359). But there is a limit as to how far the police powers may be used to disadvantage interests in private property and "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415; *Arverne Bay Constr. Co.* v. *Thatcher,* 278 N. Y. 222, 231.) The police powers may not be used to restrict the use of petitioner's property indefinitely when the corresponding benefit to the public is negligible or nonexistent. Petitioner has not contributed to the pollution caused by the discharge of sewage but only he and others similarly situated are penalized for the inadequacy of the

sewage treatment facilities. As the Court of Appeals stated in *Westwood Forest Estates* v. *Village of South Nyack* (23 N Y 2d 424, 427): "A municipality has, of course, the power to take appropriate steps to deal with sanitation problems, including those created by inadequate biological treatment of sewage. The instant sanitation problem is, however, general to the community and not caused by the nature of plaintiff's land (see *De Sena* v. *Gulde*, 24 A D 2d 165, 171). It is, therefore, impermissible to single out this plaintiff to bear a heavy financial burden because of a general condition in the community (*De Sena* v. *Gulde, supra; Opgal, Inc.* v. *Burns*, 20 Misc. 2d 803, 806-809, affd. 10 A D 2d 977, affd. 9 N Y 2d 659, mot. to amend remittitur den. 9 N Y 2d 717)."

The judgment should be reversed and the petition reinstated.

DEL VECCHIO, J. P., MARSH, WITMER AND HENRY, JJ., concur.

Judgment unanimously reversed on the law with costs and petition reinstated.

APPENDIX C

State of New York—Department of Environmental Conservation

—o—

In the Matter
of
Alleged Violations of Article 12 of the Public Health Law,

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,
Respondents.

Case No. 1244

—o—

NOTICE OF HEARING

It appearing to the Commissioner of Environmental Conservation, after investigation, that the above Respondents are and for many years last past have been discharging effluents of sewage and wastes not having been subjected to effective primary treatment into the surface waters of Nine Mile Creek, which cause conditions in contravention of the standards adopted for such waters all in violation of Article 17 of the Environmental Conservation Law, and that it is now the law of the State of New York that the full discharge of the duties of the Department of Environmental Conservation under and pursuant to said Article 17 requires that the orders of the Commissioner of Health and of the Commissioner of Environmental Conservation duly made and issued in the

above entitled proceeding be modified pursuant to Section 17-0303 of the Environmental Conservation Law to set and establish a definite date on or before which all discharges of sewage or wastes or effluents thereof by the Respondents or through facilities under the control of them or either of them into the waters of the State in violation of such article shall be abated.

TAKE NOTICE that a public hearing will be held in the PERB hearing room at 50 Wolf Road, Town of Colonie, Albany County, New York, before a duly designated Hearing Officer and representative of the Commissioner of Environmental Conservation at 10:00 A.M. o'clock on the 22nd day of August, 1973, for the purpose of receiving any evidence relevant to such modifications of said orders as should properly be made.

TAKE FURTHER NOTICE that you may appear in person or by counsel and introduce any relevant evidence on your behalf, cause witnesses or documentary evidence to be subpoenaed, cross examine witnesses against you and submit proposed findings.

TAKE FURTHER NOTICE that on or before said return day you are required to file a statement setting forth your position and your answer, if any, and the methods, practices and procedures which are being taken to prevent polluting discharges into said waters and your sewers and sewage disposal works and any other information pertinent to the case.

TAKE FURTHER NOTICE that all witnesses will be sworn and that a stenographic record of all testimony and proceedings had on said hearing will be made.

TAKE FURTHER NOTICE that the procedures on said hearing will be governed by statute and case law in such case

made and provided, and particularly, but not exclusively, by said Article 17, and that Part 658 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby waived.

Dated: July 26, 1973.

HENRY L. DIAMOND,
Commissioner of Environmental Conservation of the State of New York.

To: VILLAGE OF CAMILLUS,
Attention: MORRIS RAICHLIN, Mayor,
Camillus, N. Y. 13031.

To: BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS.
Attention: JANET KENNEDY, Village Clerk,
Camillus, N. Y. 13031.